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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jim Munene,

10 Plaintiff,

11 v.

12 Alejandro Mayorkas,

13 Defendant.
14

No. CV-19-00220-TUC-RM (JR)

ORDER

15 Plaintiff Jim Munene—a former Supervisory Border Patrol Agent at the Border
16 Patrol Station in Ajo, Arizona—sues the Secretary of the United States Department of
17 Homeland Security under Title VII of the Civil Rights Act of 1964. (Doc. 1.) The Court
18 referred this case to Magistrate Judge Leslie A. Bowman for pretrial proceedings and
19 report and recommendation, in accordance with the provisions of 28 U.S.C. § 636(b)(1).
20 (Doc. 12.)¹

21 Currently pending before the Court are Plaintiff's Objection (Doc. 55) to
22 Magistrate Judge Bowman's October 28, 2021 Order (Doc. 54) denying Plaintiff's
23 Motion to Amend Complaint (Doc. 37), and Plaintiff's Objection (Doc. 56) to Magistrate
24 Judge Bowman's October 27, 2021 Order (Doc. 52) directing the Clerk of Court to
25 publicly file exhibits to Defendant's Response to Plaintiff's Motion to Amend Complaint.

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28 ¹ Due to reassignments, the case is now referred to Magistrate Judge Jacqueline Rateau.
(Doc. 64.)

I. Background

In his pro se Complaint, Plaintiff alleges that Defendant discriminated against him based on race, color, and national origin by failing to give him a performance award in 2014. (Doc. 1 at 4-5.)² He seeks an apology letter, damages of \$100,000, restoration of full benefits, retirement from the Department of Homeland Security, and reimbursement of his attorney's fees and costs. (*Id.* at 6.)

On February 28, 2020, Plaintiff moved to amend his Complaint to challenge employment actions taken in 2013. (Doc. 29.) On the same date, the parties stipulated to stay the above-captioned case until Plaintiff's return from active duty in the United States Army. (Doc. 30.) Magistrate Judge Bowman (1) denied Plaintiff's motion to amend due to Plaintiff's failure to comply with LRCiv 15.1(a); and (2) stayed this case pursuant to 50 U.S.C. § 3932(b). (Doc. 31.) Plaintiff notified the Court of his return from active duty on February 25, 2021. (Doc. 32.) On May 14, 2021, Magistrate Judge Bowman issued a Scheduling Order setting a deadline of August 10, 2021, for moving to amend pleadings. (Doc. 36.)

On August 5, 2021, Plaintiff filed a First Amended Complaint ("FAC"). (Doc. 37.) Because Plaintiff could not amend his Complaint as a matter of course under Federal Rule of Civil Procedure 15, Magistrate Judge Bowman construed the filing as a Motion to Amend. (Docs. 39, 54.)³ In the proposed FAC, Plaintiff sought to allege claims based on termination of employment, unequal terms and conditions of employment, retaliation, discrimination, hostile work environment, and harassment beginning on July 17, 2012, in violation of Title VII and the Fifth Amendment to the United States Constitution. (Doc. 37 at 3-4.) Plaintiff also sought to increase his requested compensatory damages to \$7,000,000 and to add requests for punitive damages and a declaratory judgment. (*Id.* at 6.)

² All record citations refer to the page numbers generated by the Court's electronic filing system.

³ Under Rule 15(a)(1) of the Federal Rules of Civil Procedure, "[a] party may amend its pleading once as a matter of course no later than: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading." Fed. R. Civ. P. 15(a)(1).

1 Plaintiff attached as exhibits to his proposed FAC various documents related to
2 administrative proceedings before the Equal Employment Opportunity Commission
3 (“EEOC”) and Merit Systems Protection Board (“MSPB”). (Doc. 37-1.) Based on the
4 attached administrative documents, it appears Plaintiff sought to add claims arising from:

5 (1) the Department of Homeland Security’s decision to place him on an indefinite
6 suspension effective September 30, 2012;

7 (2) employment actions taken in 2013;

8 (3) employment actions taken in 2014, including an admonishment concerning
9 loss of a personal identity verification (“PIV”) card that Plaintiff alleges he did not
10 lose;

11 (4) employment actions taken in 2016 and 2017; and

12 (5) the May 30, 2018 termination of Plaintiff’s employment.

13 Defendant responded to Plaintiff’s Motion to Amend Complaint (Doc. 46) and
14 moved to file certain attachments to its Response under seal to protect the privacy of
15 Plaintiff’s personnel records (Doc. 47). Plaintiff opposed Defendant’s Motion to Seal,
16 arguing that the personnel records were not personal and that sealing them would violate
17 his First Amendment rights. (Doc. 50.) In an Order filed on October 27, 2021,
18 Magistrate Judge Bowman construed Plaintiff’s Response as a waiver of any objections
19 he may have had to filing the exhibits unsealed and, accordingly, ordered the Clerk of
20 Court to publicly file the exhibits. (Doc. 52; *see also* Doc. 53.) In an Order filed on
21 October 28, 2021, Magistrate Judge Bowman denied Plaintiff’s Motion to Amend on the
22 ground that Plaintiff’s proposed amendments to his Complaint would be futile. (Doc.
23 54.)

24 Plaintiff filed Objections to Magistrate Judge Bowman’s October 27, 2021 and
25 October 28 2021 Orders. (Docs. 55, 56.) On November 9, 2021, Magistrate Judge
26 Bowman again stayed this case due to Plaintiff’s active military service. (Doc. 58.)
27 Plaintiff notified the Court of his return from active military service on December 27,
28 2022. (Doc. 59.) The pending Objections became fully briefed on July 9 and 10, 2023.

(Docs. 66, 67, 68, 69.)

II. Standard of Review

A district judge may reconsider a magistrate judge’s determination of a pretrial matter under 28 U.S.C. § 636(b)(1)(A) “where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A). “The clearly erroneous standard, which applies to a magistrate judge’s findings of fact, is significantly deferential, requiring a definite and firm conviction that a mistake has been committed.” *Jones v. Corr. Corp. of Am.*, No. CIV-10-2769-PHX-RCB(JRI), 2011 WL 1706838, at *4 (D. Ariz. May 5, 2011) (internal quotation marks omitted). The contrary to law standard “permits independent review of purely legal determinations by the magistrate judge.” *Id.* (internal quotation marks omitted).

When a magistrate judge denies a motion to amend based on futility and thereby precludes a party from asserting a new claim, it is not entirely clear whether the “clearly erroneous or contrary to law” standard of 28 U.S.C. § 636(b)(1)(A) governs the district court’s review of the decision, or whether the decision should be treated as a report and recommendation for which the district judge must make a de novo determination of objected-to portions. *See Morgal v. Maricopa Cnty. Bd. of Supervisors*, 284 F.R.D. 452, 458-59 (D. Ariz. 2012). Here, Defendant concedes that de novo review applies to Plaintiff’s Objection to Magistrate Judge Bowman’s October 28, 2021 Order denying his Motion to Amend, regardless of whether the decision is considered dispositive or non-dispositive. (Doc. 66 at 3.)

III. Objection to Order Denying Motion to Seal

In his Objection to Magistrate Judge Bowman’s October 27, 2021 Order resolving Defendant’s Motion to Seal, Plaintiff opposes sealing the documents at issue and indicates he cannot access the documents. (Doc. 56.) Plaintiff’s Objection appears to stem from a misunderstanding of Magistrate Judge Bowman’s ruling. Magistrate Judge Bowman denied Defendant’s request to seal the documents at issue and ordered the Clerk of Court to file them publicly. (Doc. 52.) The documents have been publicly filed at

1 docket entry 53. Plaintiff has access to the electronic docket in this case. (*See* Doc. 25.)
 2 Accordingly, Plaintiff's Objection will be overruled \ and Magistrate Judge Bowman's
 3 October 27, 2021 Order will be affirmed.

4 **IV. Objection to Order Denying Motion to Amend Complaint**

5 In denying Plaintiff leave to amend his Complaint, Magistrate Judge Bowman
 6 found that: (1) Plaintiff failed to timely file a civil action after the MSPB dismissed his
 7 appeal of his 2012 suspension; (2) Plaintiff failed to timely file a civil action after the
 8 EEOC dismissed his administrative claims regarding employment actions taken in 2013;
 9 (3) Plaintiff's claims concerning employment actions taken in 2016 and 2017 are unripe
 10 because the EEOC has not issued a final decision in the underlying administrative appeal;
 11 (4) Plaintiff's claim challenging his 2018 termination is unripe because the MSPB has not
 12 issued a final decision in the underlying administrative appeal; (5) Plaintiff did not timely
 13 file a civil action challenging the EEOC's intermediate decision addressing Plaintiff's
 14 2018 termination; (6) Plaintiff fails to state a Fifth Amendment claim on which relief can
 15 be granted against Defendant Alejandro Mayorkas in his individual capacity; and (7) a
 16 Fifth Amendment claim against Mayorkas in his official capacity is barred by sovereign
 17 immunity. (Doc. 54.)

18 **A. Legal Standard**

19 District courts have discretion in determining whether to grant or deny leave to
 20 amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Leave should freely be given "when
 21 justice so requires." Fed. R. Civ. P. 15(a)(2). In determining whether to grant leave to
 22 amend under Rule 15(a), courts consider whether there has been "undue delay, bad faith
 23 or dilatory motive on the part of the movant, repeated failure to cure deficiencies by
 24 amendments previously allowed, undue prejudice to the opposing party by virtue of
 25 allowance of the amendment, futility of amendment, etc.'" *Eminence Capital, LLC v.*
 26 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam) (quoting *Foman*, 371 U.S.
 27 at 182). "[R]ule 15's policy of favoring amendments to pleadings should be applied with
 28 extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)

(internal quotation marks omitted). Nevertheless, “futile amendments should not be permitted.” *Id.* at 188 (internal quotation marks omitted).

In assessing futility, courts typically apply “the same standard of legal sufficiency as applies under Federal Rule of Civil Procedure 12(b)(6).” *Stonebrae, L.P. v. Toll Bros., Inc.*, No. C-08-0221-EMC, 2010 WL 114010, at *1 (N.D. Cal. Jan. 7, 2010). A complaint is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) if it does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Detailed factual allegations are not required, but the complaint must contain “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* However, when a plaintiff is proceeding pro se, the court must “construe the pleadings liberally” and afford the plaintiff “the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

Courts may consider documents incorporated by reference in a complaint and matters of judicial notice in determining whether a complaint is subject to dismissal under the standards of Rule 12(b)(6). *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Courts may take judicial notice of administrative proceedings for the truth of the existence of those proceedings, but not for the truth of facts recited in administrative decisions. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001).

B. Discussion

Plaintiff timely moved to file his proposed First Amended Complaint prior to expiration of the deadline set forth in Magistrate Judge Bowman’s Scheduling Order for moving to amend pleadings. (See Docs. 36, 37.) Accordingly, the Court does not find undue delay. See *Eminence Capital, LLC*, 316 F.3d at 1052. There is also no indication

1 of bad faith or repeated failure to cure deficiencies by amendments previously allowed.
 2 *See id.* Because discovery in this case is ongoing (*see* Doc. 81), the Court does not find
 3 that Defendant would be unduly prejudiced by allowing Plaintiff to amend his Complaint
 4 at this time. *See id.*

5 Accordingly, the Court’s determination of whether to grant leave to amend hinges
 6 on an assessment of whether Plaintiff’s proposed amendments would be futile. In
 7 assessing futility, the Court analyzes Plaintiff’s proposed new Title VII claims in
 8 chronological order based on the date of the challenged employment actions, and then
 9 addresses Plaintiff’s proposed Fifth Amendment claims.

10 ***(1) Department of Homeland Security’s decision to place Plaintiff on an***
 11 ***indefinite suspension effective September 30, 2012***

12 Plaintiff appealed to the MSPB the Department of Homeland Security’s placement
 13 of him on an indefinite suspension effective September 10, 2012. (Doc. 53-1 (MSPB No.
 14 DE-0752-13-0012-I-1).) On October 31, 2012, the MSPB accepted Plaintiff’s
 15 withdrawal of the appeal and dismissed the appeal with prejudice, with the understanding
 16 that Plaintiff would have the right to file a new appeal if his indefinite suspension
 17 continued beyond the date of resolution of a criminal indictment then-pending against
 18 Plaintiff. (*Id.* at 2-3.)

19 Magistrate Judge Bowman found that it would be futile to add a Title VII claim
 20 challenging the 2012 suspension because such a claim would be subject to dismissal as
 21 untimely. (Doc. 54 at 3-4.) In his Objection to Magistrate Judge Bowman’s Order,
 22 Plaintiff argues that his claim concerning the 2012 suspension “was resurrected by new
 23 information” when Defendant created a hostile work environment by admonishing
 24 Plaintiff for losing a PIV card that Plaintiff asserts he did not lose. (Doc. 55 at 3.) In
 25 response, Defendant argues that Magistrate Judge Bowman correctly determined that
 26 Plaintiff’s proposed claim is time-barred. (Doc. 66 at 4-5.) Defendant further argues that
 27 a claim challenging the 2012 suspension cannot be resurrected by Plaintiff’s allegation
 28 that Defendant created a hostile work environment in 2014. (*Id.* at 5-6.)

1 A district court has subject matter jurisdiction over a Title VII claim only if the
 2 plaintiff has exhausted his or her administrative remedies. *B.K.B. v. Maui Police Dep't*,
 3 276 F.3d 1091, 1099 (9th Cir. 2002). Typically, a federal employee exhausts a Title VII
 4 claim by filing a complaint with the Equal Employment Office (“EEO”) of the
 5 employee’s agency, with the option of appealing to the EEOC. *Crowe v. Wormuth*, 74
 6 F.4th 1011, 1023 (9th Cir. 2023); *see also* 29 C.F.R. §§ 1614.106, 1614.110,
 7 1614.401(a), 1614.407. However, when the employee alleges that discrimination
 8 prohibited by Title VII formed the basis of an adverse employment action over which the
 9 MSPB has jurisdiction,⁴ the employee exhausts administrative remedies for purposes of
 10 Title VII by either: (1) filing a complaint with the agency EEO, with an optional appeal
 11 to the MSPB, or (2) appealing the employment action directly to the MSPB. *Crowe*, 74
 12 F.4th at 1024; *see also* 5 C.F.R. § 1201.154; 29 C.F.R. § 1614.302(b), (d). An MSPB
 13 appeal raising issues of prohibited discrimination, known as a “mixed case” appeal,
 14 “must state that there was discrimination in connection with the matter appealed” and
 15 “must state specifically how the agency discriminated against the appellant.” 5 C.F.R. §
 16 1201.153(a)(1). An employee who files a mixed case appeal to the MSPB may file a
 17 civil action within 30 days of receipt of notice of the MSPB’s final decision. 5 U.S.C. §§
 18 7702, 7703(a)(1), (b)(2); 5 C.F.R. § 1201.175; 29 C.F.R. § 1614.310(b).

19 There is no indication in the record that Plaintiff alleged in MSPB appeal number
 20 DE-0752-13-0012-I-1 that discrimination prohibited by Title VII was a basis for his 2012
 21 suspension. Accordingly, there is no indication that Plaintiff exhausted a Title VII claim
 22 arising from the 2012 suspension by filing MSPB appeal number DE-0752-13-0012-I-1.
 23 Even if Plaintiff did properly exhaust a Title VII claim arising from the 2012 suspension,
 24 the claim is time-barred. If Plaintiff’s MSPB appeal alleged discrimination, then Plaintiff
 25 had 30 days from receipt of notice of the MSPB’s final decision to file a civil action in an

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 27 ⁴ The MSPB is a “quasi-judicial Government agency” that adjudicates federal employee
 28 appeals of certain categories of adverse employment actions, including removals and
 suspensions of more than 14 days. *Sloan v. West*, 140 F.3d 1255, 1258-59 (9th Cir.
 1998), *abrogated on other grounds by Perry v. MSPB*, 582 U.S. 420 (2017); *see also* 5
 U.S.C. §§ 7512, 7701; 5 C.F.R. § 1201.3(a)(1).

appropriate district court. *See* 5 U.S.C. § 7703(b)(2); 5 C.F.R. § 1201.175(b); 29 C.F.R. § 1614.310(b). He failed to do so.⁵

Plaintiff's allegation that he was admonished in 2014 for losing a PIV card does not resurrect a Title VII claim arising from his 2012 suspension. The 2012 suspension is a discrete act, and "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

For the reasons discussed above, allowing Plaintiff to amend his Complaint to add a Title VII claim arising from his 2012 suspension would be futile because it does not appear that Plaintiff exhausted such a claim and, if he did, the claim is time-barred.

(2) *Employment actions taken in 2013*

Plaintiff administratively challenged several employment actions taken in 2013: (1) Plaintiff was ordered to return to work in an administrative position and was denied administratively uncontrollable overtime; (2) Plaintiff was denied exercise time, an office, computer access as a supervisor, computer equipment, and a telephone; (3) Plaintiff was charged a health care premium while he was on active duty; (4) Plaintiff was denied administrative time for house hunting; (5) Plaintiff was denied a PIV card; and (6) time that Plaintiff spent traveling for training in November 2013 was changed from overtime to travel compensatory time. (Doc. 37-1 at 68-69 (EEOC Appeal No. 0120180025; Hearing No. 540-2014-00136X; Agency No. HS-CBP-02199-2013).) On June 7, 2019, the EEOC issued a final decision, finding no discrimination and notifying Plaintiff of his right to file a civil action within 90 days. (*Id.* at 68-73.)

Magistrate Judge Bowman found that it would be futile to allow Plaintiff to add

⁵ Magistrate Judge Bowman's Order finds that Plaintiff had 60 days from the date the MSPB's decision became final to file a civil action. (Doc. 54 at 3-4.) Civil actions seeking review of a final order or decision of the MSPB that do not challenge the MSPB's disposition of allegations of discriminatory personnel practices must be filed within 60 days after the MSPB issues notice of the final order or decision. *See* 5 U.S.C. § 7703(b)(1). Accordingly, the 60-day deadline applied if MSPB appeal number DE-0752-13-0012-I-1 was *not* a mixed case appeal alleging discrimination prohibited by Title VII; however, in that scenario, Plaintiff did not exhaust a Title VII claim by filing the MSPB appeal.

1 Title VII claims challenging the 2013 employment actions because any such claims
2 would be subject to dismissal as time-barred. (Doc. 54 at 4-5.) Magistrate Judge
3 Bowman recognized Plaintiff's assertion that he did not receive the EEOC's final
4 decision until 2020 but found that, even if Plaintiff received the decision on the last day
5 of 2020, he filed his Motion to Amend over 90 days later, on August 5, 2021. (*Id.* at 5.)
6 Finally, Magistrate Judge Bowman found that the proposed claims challenging the 2013
7 employment actions did not relate back to Plaintiff's original Complaint. (*Id.*)

8 In his Objection, Plaintiff argues that he was denied a meaningful opportunity to
9 appeal the EEOC's decision concerning the 2013 employment actions because the
10 decision was mailed to the wrong address. (Doc. 55 at 4.) He avers that he sought to
11 amend his Complaint to challenge the 2013 employment actions on February 28, 2020,
12 shortly after he received the EEOC's final decision. (*Id.* at 4-5.) He also argues that his
13 claims challenging the 2013 employment actions relate back to the claim in his original
14 Complaint. (*Id.* at 5-6.) In response, Defendant concedes that Plaintiff filed a Motion to
15 Amend in February 2020, but he notes that Magistrate Judge Bowman denied that Motion
16 and that Plaintiff failed to file a second Motion to Amend within 90 days of his return
17 from active duty. (Doc. 66 at 7.)

18 In relevant part, a federal employee may file a civil action within 90 days of his
19 receipt of notice of final action taken by the EEOC upon an appeal from an agency
20 decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407(c). This 90-day requirement
21 operates as a statute of limitations, and lawsuits filed outside the 90-day period are
22 barred. *Scholar v. Pacific Bell*, 963 F.2d 264, 266-67 (9th Cir. 1992). However, the
23 statute of limitations is subject to the doctrine of equitable tolling. *Id.* at 267-68. The
24 Supreme Court has "allowed equitable tolling in situations where the claimant has
25 actively pursued his judicial remedies by filing a defective pleading during the statutory
26 period." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

27 Here, Plaintiff alleges that the EEOC's June 7, 2019 final decision was mailed to
28 the wrong address and, as a result, he did not receive it until 2020. (Doc. 29 at 1; Doc. 49

1 at 6-7; Doc. 55 at 4.) Plaintiff first moved to amend his Complaint to add claims
 2 challenging the 2013 employment actions on February 28, 2020. (Doc. 29.) Taking as
 3 true Plaintiff's allegation that he received the EEOC's decision in 2020, his first Motion
 4 to Amend was filed within the 90-day limitations period. Magistrate Judge Bowman
 5 denied Plaintiff's first Motion to Amend without prejudice due to Plaintiff's failure to
 6 comply with LRCiv 15.1(a). (Doc. 31.) Plaintiff filed his second Motion to Amend on
 7 August 5, 2021 (Doc. 37), within the deadline for moving to amend pleadings set forth in
 8 Magistrate Judge Bowman's Scheduling Order (Doc. 36). Defendants cite no legal
 9 authority in support of their assertion that Plaintiff was required to file his second Motion
 10 to Amend within 90 days of his return from active military service. Even assuming
 11 Defendants' argument is correct, the Court finds that equitable tolling is appropriate
 12 because Plaintiff "actively pursued his judicial remedies by filing a defective pleading
 13 during the statutory period." *Irwin*, 498 U.S. at 96.⁶ Accordingly, the Court disagrees
 14 with Magistrate Judge Bowman's finding that adding claims challenging the 2013
 15 employment actions would be futile on the ground that such claims are time-barred. The
 16 Court will allow Plaintiff to amend his Complaint to add claims challenging the 2013
 17 employment actions.

18 ***(3) Employment actions taken in 2014, 2016, and 2017***

19 Plaintiff administratively challenged several employment actions taken in 2014,
 20 2016, and 2017: (1) on March 28, 2014, Gilberto Ramirez told Plaintiff he knew about
 21 his EEO complaint and verbally admonished Plaintiff for losing his PIV card ("PIV
 22 admonishment claim"); (2) on October 20, 2016, Plaintiff received an annual
 23 performance appraisal with an overall rating of "achieved expectations"; (3) on March 9,
 24 2017, Plaintiff was charged with 8 hours of absence without leave ("AWOL claim"); (4)
 25 on October 30, 2017 Plaintiff received an annual performance appraisal with an overall
 26 rating of "achieved expectations"; and (5) on October 30, 2017, Plaintiff learned he

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 28 ⁶ Plaintiff does not specifically argue that he is entitled to equitable tolling, but he identifies circumstances that support the application of equitable tolling, and this Court is obliged to liberally construe pro se filings.

1 would not receive a fiscal year 2017 annual performance award. (Doc. 37-1 at 50-51;
 2 Doc. 53-4 at 3 (EEOC No. 540-2021-00158X).)⁷ An ALJ dismissed the PIV
 3 admonishment claim as untimely and dismissed the AWOL claim based on collateral
 4 estoppel. (Doc. 37-1 at 50-51, 131-132.) The record before this Court indicates that
 5 administrative proceedings in EEOC No. 540-2021-00158X are ongoing.

6 Magistrate Judge Bowman found that it would be futile to add claims challenging
 7 the employment actions at issue in EEOC No. 540-2021-00158X because the EEOC has
 8 not yet issued a final decision and therefore Plaintiff has not exhausted his claims
 9 administratively. (Doc. 54 at 6.) Magistrate Judge Bowman recognized that a claim
 10 becomes ripe for judicial review 180 days after the filing date of an administrative
 11 complaint if final agency action is not taken; however, Plaintiff did not argue his claims
 12 were ripe under that rule and did not dispute Defendant's assertion that the claims are
 13 unripe. (*Id.*)

14 In his Objection, Plaintiff concedes that the EEOC has not issued a final decision,
 15 but he argues that the EEOC erroneously dismissed his PIV admonishment and AWOL
 16 claims and that he has exhausted all administrative remedies with respect to those
 17 specific claims. (Doc. 55 at 5; Doc. 68 at 14.) Defendant argues that Magistrate Judge
 18 Bowman correctly found that Plaintiff has not exhausted his administrative remedies for
 19 the claims at issue in EEOC No. 540-2021-00158X because the EEOC has not issued a
 20 final decision. (Doc. 66 at 8.) Defendant notes that Plaintiff has never argued his claims
 21 are ripe under the 180-day provision of 29 C.F.R. § 1614.407(b). (*Id.* at 8-9 n.6.)
 22 Defendant also argues that the delay in the administrative processing of EEOC number
 23 540-2021-00158X is due to Plaintiff's active military service and not attributable to the
 24 EEOC. (*Id.*)

25
 26 ⁷ Plaintiff raised the first three claims in EEOC No. 540-2017-00337X, Agency No. HS-
 27 CBP-00211-2017. (*See* Doc. 37-1 at 50-51; Doc. 53-4 at 3.) It appears he raised the
 28 latter two claims in EEOC No. 540-2018-00241X, Agency No. HS-CBP-00634-2018.
 (*See* Doc. 53-4 at 2-3.) The cases were joined for processing and assigned a new EEOC
 case number, 540-2021-00158X. (*Id.* at 2.) Due to an apparent typo in an EEOC Order
 (*id.*), Magistrate Judge Bowman and Defendant refer to this EEOC case number as 540-
 3032-00158X. (*See, e.g.*, Doc. 54 at 6; Doc. 66 at 8.)

1 The interim ALJ orders dismissing the PIV admonishment and AWOL claims are
 2 not final agency orders. *See* 29 C.F.R. § 1614.110. Title VII authorizes an employee to
 3 file a civil action in an appropriate district court within 90 days of receipt of agency final
 4 action or after 180 days from the date of filing the complaint if agency final action has
 5 not been taken. 29 C.F.R. § 1614.407(a)-(b). Plaintiff does not argue in his Objection
 6 (Doc. 55) or Reply (Doc. 68) that he is entitled to file a civil action under the 180-day
 7 provision of 29 C.F.R. § 1614.407(b), even though Magistrate Judge Bowman and
 8 Defendant have both highlighted that provision. The Court will not sua sponte rely on 29
 9 C.F.R. § 1614.407(b), as it appears Plaintiff does not wish to rely on that provision and
 10 instead intends to continue administratively pursuing the remaining claims at issue in
 11 EEOC number 540-2021-00158X. Accordingly, the Court will affirm Magistrate Judge
 12 Bowman's finding that allowing Plaintiff to amend his Complaint to assert claims arising
 13 from the employment actions taken in 2014, 2016, and 2017 would be futile because such
 14 claims are not yet exhausted.

15 ***(4) May 30, 2018 termination of Plaintiff's employment***

16 Plaintiff filed an EEO complaint alleging that the Department of Homeland
 17 Security discriminated against him when his employment was terminated on May 30,
 18 2018. (*See* Doc. 37-1 at 75 (Agency No. HS-CBP-02141-2018).) The agency issued a
 19 final decision finding no discrimination, and Plaintiff appealed to the EEOC. (*Id.* at 76.)
 20 On February 12, 2020, the EEOC vacated the agency's decision and remanded for
 21 issuance of a new final agency decision that provided information concerning the
 22 appropriate appeal rights for a mixed case complaint appealable to the MSPB. (*Id.* at 75-
 23 79 (EEOC appeal number 2019004938).)

24 Plaintiff then filed a mixed case appeal challenging his 2018 termination to the
 25 MSPB. (*See* Doc. 53 (MSPB number DE-0752-19-0419-I-1).) On March 5, 2020, the
 26 MSPB affirmed the agency's action, finding that Plaintiff failed to prove discrimination
 27 or retaliation. (*Id.*) Plaintiff filed a Petition for Review on April 4, 2020. (Doc. 37-1 at
 28 121-122; Doc. 46-2; Doc. 53-5.) It appears that no decision has been reached on the

1 Petition for Review due to the MSPB's lack of quorum.

2 In addition to filing a mixed case appeal with the MSPB, Plaintiff also filed a
3 Petition for Enforcement with the EEOC, seeking to enforce the February 12, 2020
4 EEOC decision. (*See* Doc. 37-1 at 134.) The EEOC issued a letter to Plaintiff dated
5 April 20, 2020, that found: (1) the agency did not timely issue another final agency
6 decision, but the agency's initial decision addressed the merits of Plaintiff's claims
7 concerning his termination and merely incorrectly recorded Plaintiff's appeal rights; (2)
8 the agency corrected the erroneous recording of appeal rights with a July 12, 2019 errata;
9 and (3) the errata was sufficient to satisfy the reissuance-of-final-agency-decision
10 requirement. (*Id.*) The EEOC also noted that Plaintiff had unsuccessfully appealed his
11 2018 termination to the MSPB. (*Id.*)

12 Magistrate Judge Bowman found that it would be futile to allow Plaintiff to add
13 claims challenging his 2018 termination because his Petition for Review is pending with
14 the MSPB and he therefore has not yet exhausted administrative remedies. (Doc. 54 at 6-
15 7.) Magistrate Judge Bowman also recognized Plaintiff's assertion that he is actually
16 seeking judicial review of the EEOC's February 12, 2020 decision and found that a claim
17 challenging that decision would be untimely because Plaintiff's Motion to Amend was
18 filed on August 5, 2021, more than 90 days after Plaintiff received the EEOC's decision.
19 (*Id.* at 7-8.)

20 Plaintiff does not assert that a claim related to his 2018 termination is
21 administratively exhausted; to the contrary, he contends that the MSPB has not issued a
22 final decision concerning his appeal of the 2018 termination. (*See* Doc. 37 at 6; Doc. 49
23 at 4-5.) In his Objection, Plaintiff complains that he prevailed in his EEOC appeal
24 concerning his 2018 termination and that Defendant "continues to defy this EEOC
25 Order." (Doc. 55 at 1-2, 6-7.) Defendant argues in response that the EEOC did not have
26 jurisdiction over Plaintiff's mixed case appeal and that Plaintiff's claims related to his
27 2018 termination are premature because the MSPB has not issued a final decision. (Doc.
28 66 at 9-10.)

1 The Court agrees with Magistrate Judge Bowman that Plaintiff has not exhausted
 2 his administrative remedies with respect to Title VII claims arising from his 2018
 3 termination because the MSPB has not issued a final decision. *See* 5 C.F.R. § 1201.113;
 4 *see also* 5 U.S.C. § 7701(e)(1). To the extent Plaintiff seeks to challenge the EEOC's
 5 interim decision or its resolution of the Petition for Enforcement, Plaintiff has not shown
 6 that this Court has jurisdiction over that claim, nor has he shown that his judicial
 7 challenge to the EEOC's February 12, 2020 decision was timely filed.

8 **(5) Fifth Amendment Claims**

9 The Court agrees with Magistrate Judge Bowman that, to the extent Plaintiff is
 10 seeking to assert Fifth Amendment claims against Defendant Mayorkas in his individual
 11 capacity, he has failed to allege any specific actions by Mayorkas that violated Plaintiff's
 12 Fifth Amendment rights.⁸ (*See* Doc. 54 at 8-9.) To the extent Plaintiff is seeking to
 13 assert Fifth Amendment claims for damages against Defendant Mayorkas in his official
 14 capacity, the Court agrees with Magistrate Judge Bowman that sovereign immunity bars
 15 such claims because Plaintiff has not satisfied his burden of establishing that the action
 16 falls within an express waiver of sovereign immunity. *See Dunn & Black, P.S. v. United*
 17 *States*, 492 F.3d 1084, 1087-88 (9th Cir. 2007). Nothing in Plaintiff's Objection
 18 undermines Magistrate Judge Bowman's conclusion that granting Plaintiff leave to
 19 amend his Complaint to assert Fifth Amendment claims would be futile.

20 **(6) Declaratory Judgment Claim**

21 Plaintiff's proposed First Amended Complaint adds a claim for declaratory relief
 22 to "end the conflict" between the EEOC's favorable decision and the MSPB's non-final
 23 decision. (Doc. 37 at 6.) Plaintiff appears to be referencing the administrative decisions
 24 concerning his 2018 termination. As discussed above, the Court finds that adding a claim
 25 challenging the 2018 termination would be futile.⁹ Accordingly, the Court also finds that

26 ⁸ Furthermore, to the extent Plaintiff is seeking to assert a cause of action for damages
 27 directly under the Fifth Amendment pursuant to *Bivens v. Six Unknown Named Agents of*
 28 *the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), it appears such claims would extend
Bivens to a new context and special factors counsel against recognizing a *Bivens* remedy.
See Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022).

⁹ In addition, there is no conflict between the EEOC's decision in EEOC appeal number

1 allowing Plaintiff to add his proposed claim for declaratory relief would be futile.

2 **(7) Damages**

3 Plaintiff's proposed First Amended Complaint sought to increase Plaintiff's
4 requested compensatory damages to \$7,000,000 and to add a claim for \$3,000,000 in
5 punitive damages. (Doc. 37 at 6.) Defendant has identified no reason why Plaintiff
6 should not be allowed to amend his requested damages. Accordingly, the Court will
7 allow Plaintiff to amend his Complaint to adjust his requested damages.

8 **IT IS ORDERED** that Plaintiff's Objection to Magistrate Judge Bowman's
9 October 27, 2021 Order (Doc. 56) is **overruled**. Magistrate Judge Bowman's October
10 27, 2021 Order (Doc. 52) is **affirmed**.

11 **IT IS FURTHER ORDERED** that Plaintiff's Objection to Magistrate Judge
12 Bowman's October 28, 2021 Order (Doc. 55) is **partially granted and partially**
13 **overruled**. Magistrate Judge Bowman's October 28, 2021 Order (Doc. 54) is **partially**
14 **affirmed and partially modified as follows**:

- 15 1. Plaintiff is granted leave to amend his Complaint to: (1) raise Title VII claims
16 challenging the 2013 employment actions at issue in EEOC Appeal No.
17 0120180025; Hearing No. 540-2014-00136X; Agency No. HS-CBP-02199-2013;
18 and (2) adjust Plaintiff's requested damages. Leave to amend is denied in all other
19 respects.
- 20 2. The Clerk of Court is directed to re-file Doc. 37 and label the filing as Plaintiff's
21 First Amended Complaint. In accordance with this Order, the First Amended
22 Complaint is construed to allege that Defendant discriminated against Plaintiff
23 based on race, color, and national origin, in violation of Title VII: (1) by failing to

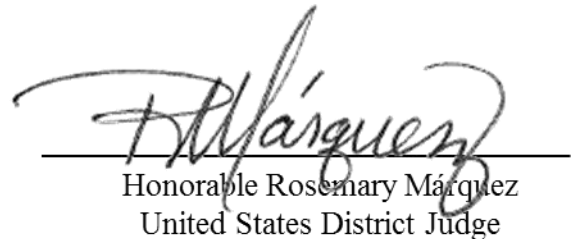
24
25 2019004938 and the MSPB's decision in MSPB number DE-0752-19-0419-I-1. The
26 agency found no discrimination in Agency No. HS-CBP-02141-2018, and Plaintiff
27 appealed to the EEOC. (Doc. 37-1 at 75-76.) The EEOC found that the appeal should
28 have been filed with the MSPB rather than the EEOC. (*Id.*) Because Plaintiff had not
been properly informed of his right to appeal to the MSPB, the EEOC directed the agency
to issue a new final decision that accurately notified Plaintiff of his appellate rights. (*Id.*)
The EEOC did not address the substance of the agency's finding of no discrimination.
(*See id.*) Plaintiff then appealed to the MSPB, and the MSPB agreed with the agency that
Plaintiff's 2018 termination was not discriminatory. (Doc. 53.)

1 give him a performance award in 2014; and (2) by taking the 2013 employment
2 actions at issue in EEOC Appeal No. 0120180025; Hearing No. 540-2014-
3 00136X; Agency No. HS-CBP-02199-2013. The First Amended Complaint is
4 dismissed to the extent it asserts any other claims under Title VII or the Fifth
5 Amendment.

- 6 3. Defendant shall answer or otherwise respond to Plaintiff's First Amended
7 Complaint within 21 days of the date this Order is filed.

8 Dated this 19th day of September, 2023.

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Honorable Rosemary Márquez
United States District Judge